Testimony
United States Senate Committee on the Judiciary
The USA PATRIOT Act In Practice: Shedding Light on the FISA Process.
September 10, 2002

The Honorable David S. Kris
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STATEMENT OF ASSOCIATE DEPUTY ATTORNEY GENERAL DAVID S. KRIS
Senate Judiciary Committee
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Mr. Chairman, Senator Hatch, and Members of the Committee: Thank you for the opportunity to testify about the government's first appeal to the Foreign Intelligence Surveillance Court of Review. Obviously, the record in the appeal is classified, because the underlying FISA applications are classified. But I am pleased to provide as much information as possible about the appeal in this open hearing. The May 17 opinion of the Foreign Intelligence Surveillance Court (the FISC), as well as a redacted version of the government's brief on appeal, are not classified, and have already been provided to the Committee. Those two documents set forth the main legal arguments pro and con, albeit without reference to the facts of any particular case.

At the request of your staff, I have focused on three specific questions: First, the question of what is at stake in this appeal, and the differences between the Intelligence Sharing Procedures proposed by the government and those approved by the FISC in its May 17 order. Second, the FISC's legal reasoning as well as our interpretation of FISA and the USA Patriot Act; here I will also discuss the practical implications of our legal reasoning. Third and finally, concerns about the accuracy of FISA applications which are raised in the FISC's May 17 opinion. At the Committee's request, I have prepared specifically to address those three issues. I know that there are many other FISA-related issues in the air today, but I must say that I have not specially prepared to address them. The appeal is more than enough to tackle in one sitting.

Background

To frame the issues properly, I have to review some background about FISA,

and describe what has – and has not – changed as a result of the USA Patriot Act. Here is what has not changed. As always, FISA continues to require advance judicial approval for almost all electronic surveillance and physical searches. As always, every FISA application must be personally signed and certified by a high-ranking and politically accountable Executive Branch official, such as the Director of the FBI. As always, every FISA application must also be personally signed and approved by the Attorney General or the Deputy Attorney General. As always, a FISA target must be an "agent of a foreign power" as defined by the statute – a standard that for United States persons requires not only a connection to a foreign power, but also probable cause that the person is engaged in clandestine intelligence activities, international terrorism, sabotage, or related activity.

Let me use terrorism as an example of this last point. A United States person – a citizen or green card holder – cannot be an "agent of a foreign power" under the rubric of terrorism, and therefore cannot be a FISA target, unless the government shows, and the court finds, probable cause that he is "knowingly engaged in" or "prepar[ing]" to engage in "international terrorism" for or on behalf of a foreign power. 50 U.S.C. § 1801(b)(2)(C).

FISA defines "international terrorism" to require, among other things, the commission of"violent" or "dangerous" acts that either "are a violation" of U.S. criminal law, or that "would be a criminal violation" if they were committed here. 50 U.S.C. § 1801(c). Flying an airplane into the World Trade Center is a crime under U.S. law, and therefore could qualify as an international terrorist act. Flying an airplane into the Eiffel Tower may not be a crime under U.S. law, but it could still qualify as international terrorism because it would be criminal if the Eiffel Tower were within our jurisdiction. To search or surveil a U.S. person under the terrorism provision of FISA, we have to show that he is "knowingly engaged" in committing, or "prepar[ing]" to commit, such a criminal act. And, of course, FISA imposes other requirements that are not required in an ordinary criminal case.

None of this was changed by the USA Patriot Act. The USA Patriot Act did certainly change the allowable "purpose" of a search or surveillance – the reasons "why" FISA may be used. But it is also accurate to say – though perhaps in need of elaboration – that the Act did not fundamentally change the "who," the "what," the "where," the "when" or the "how" of FISA surveillance.

What is at Stake in the Appeal

The first issue you identified for me concerns what is at stake in the appeal. What is at stake is nothing less than our ability to protect this country from foreign spies and terrorists. When we identify a spy or a terrorist, we have to pursue a coordinated, integrated, coherent response. We need all of our best people, intelligence and law enforcement alike, working together to neutralize the threat. In some cases, the best protection is prosecution – like the recent prosecution of Robert Hanssen for espionage. In other cases, prosecution is a bad idea, and another method – such as recruitment – is called for. Sometimes you need to use both methods. But we can't make a rational decision until everyone is allowed to sit down together and brainstorm about what to do. That is what we are seeking.

Let me draw a medical analogy. When someone has cancer, sometimes the best solution is surgery to cut the tumor out. Other times, it's chemotherapy. And in some cases you need both. But who would go to a hospital where the doctors can't sit down and talk to each other about what's best for the patient? That's bad medicine. And that is what we're trying to change.

Now let me describe the more technical aspects of what is at stake. The Intelligence Sharing Procedures proposed by the Department in March 2002 would have permitted a full range of coordination between intelligence and law enforcement officials, including both (1) information-sharing and (2) advice-giving. The FISC accepted in full the Department's standards governing information-sharing. Under those standards, the FBI must keep prosecutors informed of "all information" that is "necessary to the ability of the United States to investigate or protect against foreign attack, sabotage, terrorism, and clandestine intelligence activities." Thus, absent special limits imposed in particular cases, intelligence officials may share a full range of information with their law enforcement counterparts, including federal prosecutors.

Sharing information from intelligence to law enforcement, however, is only half of the equation. The other half is advice about the conduct of the investigation going back the other way, from law enforcement to intelligence officials. For example, if intelligence agents inform a prosecutor that a FISA target is engaging in espionage, the prosecutor may want to advise the intelligence agents to obtain the target's financial records – for example, to determine whether he has been receiving cash deposits from a hostile foreign government.

In its May 17 opinion, the FISC limited the amount of advice that can be given. While the precise extent of those limits remain somewhat opaque, even after the filing of a motion for clarification, the FISC clearly did not give us the authority that we think is appropriate under the law.

Finally, and perhaps most importantly, the FISC imposed a "chaperone" requirement, which would prohibit intelligence agents from consulting with prosecutors unless they first invite the Department's Office of Intelligence Policy and Review (OIPR) to participate. For its part, OIPR must attend the consultation unless it is "unable" to do so. That is an enormous impediment, especially because OIPR is located in Washington and the cases arise all over the country. Investigations of foreign spies and terrorists are – or at least should be – dynamic and fast-paced. Agents and lawyers need to meet and talk on the phone 5, 10, or 20 times a day, day after day, to move the investigation forward. To illustrate with an example, let me return to the medical analogy. The problem with the FISC's order is that it does not recognize that surgery, as much as chemotherapy, can be used to treat cancer – that the surgeon, as much as the oncologist, is trying to save the patient. The order says that before the oncologist can even talk to the surgeon, he has to call the hospital administrator and invite him to attend the consultation – even if the doctors and the patient are located in Los Angeles, and the hospital administrator is located in Washington. That is obviously an unworkable system.

Legal Analysis

The next question is why, as a matter of law, we disagree strongly, but respectfully with the Foreign Intelligence Surveillance Court (FISC)'s decision and legal analysis in this matter.
Our legal arguments are laid out fully in our brief, but will be summarized here. First, let me provide a legal framework. Since its enactment, FISA has required that some part of the government's purpose for conducting surveillance – whether it be the purpose, the primary purpose, or a significant purpose – must be to obtain what is called "foreign intelligence information." That raises two questions: First, what is "foreign intelligence information?"; and second, how much of a foreign intelligence purpose is required?

With respect to the first question, courts have generally (not always) indicated that a "foreign intelligence" purpose is a purpose to protect against foreign threats to national security, such as espionage and terrorism, using methods

other than law enforcement. In other words, they have drawn a distinction between a foreign intelligence purpose and a law enforcement purpose. (This is a distinction that we think is false, as I will explain shortly.) In keeping with that approach, the courts – including the FISC – have generally evaluated the government's purpose for using FISA by evaluating the nature and extent of coordination between intelligence and law enforcement officials. The more coordination that occurs, the more likely courts are to find a law enforcement purpose rather than a foreign intelligence purpose. Under pre-Patriot Act law, if the law enforcement purpose became primary, the surveillance had to stop.

We have two arguments on appeal that correspond to these two questions. The first concerns the definition of "foreign intelligence information," which under FISA includes information needed to "protect" against espionage and international terrorism. We maintain that one way to achieve that protection is to prosecute the spies and terrorists and put them in jail – in other words, that surgery, as much as chemotherapy, can help treat cancer. Prosecution is not the only way, but it's one way to protect the country. As a result, information needed as evidence in such a prosecution is itself "foreign intelligence information" as defined by the statute. In support of that argument, we rely on the original language of FISA and also on Section 504 of the USA Patriot Act, which created 50 U.S.C. §§ 1806(k) and 1825(k). As the Chairman of this Committee stated in describing Section 504:

In addition, I proposed and the Administration agreed to an additional provision in Section 505 [later changed to Section 504] that clarifies the boundaries for consultation and coordination between officials who conduct FISA search and surveillance and Federal law enforcement officials including prosecutors. Such consultation and coordination is authorized for the enforcement of laws that protect against international terrorism, clandestine intelligence activities of foreign agents, and other grave foreign threats to the nation. Protection against these foreign-based threats by any lawful means is within the scope of the definition of 'foreign intelligence information,' and the use of FISA to gather evidence for the enforcement of these laws was contemplated in the enactment of FISA. The Justice Department's opinion cites relevant legislative history from the Senate Intelligence Committee's report in 1978, and there is comparable language in the House report.

147 Cong. Rec. S11004 (Oct. 25, 2001) (emphasis added) (statement of Senator Leahy). This same argument – that "foreign intelligence information" includes

information sought for use in prosecutions designed to protect against foreign spies and terrorists – was repeated by the Chairman and Members of the Committee in the publicly available letter they sent to the FISC in July of this year:

We appreciate that "foreign intelligence information" sought under FISA may be evidence of a crime that will be used for law enforcement purposes to protect against international terrorism, sabotage, and clandestine intelligence activities by foreign powers. * * * * [Quoting the 1978 House Report, the letter states that FISA] "explicitly recognizes that information which is evidence of crimes involving clandestine intelligence activities, sabotage, and international terrorism can be sought, retained, and used pursuant to this bill." * * * * Coordination between FBI Agents and prosecutors is essential to ensure that the information sought and obtained under FISA contributed most effectively to protecting the national security against such threats.

Letter of July 31, 2002 (available at 2002 WL 1949260). This corresponds exactly to the government's principal argument on appeal.

Our second argument concerns the "significant purpose" amendment. As I mentioned, under prior law, foreign intelligence had to be the primary purpose for a FISA, and "foreign intelligence" was understood to exclude information needed for law enforcement. Thus, law enforcement could be a "significant" purpose for using FISA, but it could not be the "primary purpose." Coordination between intelligence and law enforcement personnel had to be restrained in keeping with that limit. The Patriot Act changed the old law, allowing the intelligence purpose to drop from primary to significant, and correspondingly allowing the law enforcement purpose to rise from significant to primary. What that means, at ground level, is that more coordination between intelligence and law enforcement officials should be tolerated, because even if a court would find that extensive coordination made law enforcement the primary purpose, the surveillance is still lawful under FISA. I am not sure we will have many cases in which our primary purpose is law enforcement, but the important thing is that even if we do, or the courts find that we do, the surveillance will not be at risk.

The Congressional record is replete with statements acknowledging that Members understood the implications of this change to "significant" purpose. See, 147 Cong. Rec. S10593 (Oct. 11, 2001) (statement of Senators Leahy and Cantwell); 147 Cong. Rec. S11021 (Oct. 25, 2001)(statement of Senator

Feingold); 147 Cong. Rec. S11025 (Oct. 25, 2001)(statement of Senator Wellstone); Hearing of September 24, 2001, available at 2001 WL 1147486 (statement of Senator Edwards).

Indeed, it is not surprising that these Members of Congress understood the point, because the Department itself clearly described the implications of the "significant purpose" amendment in written submissions. In a letter supporting the "significant purpose" amendment sent on October 1, 2001 to the Chairs and Ranking Members of the House and Senate Judiciary and Intelligence Committees, the Department stated that the amendment would recognize that "the courts should not deny [the President] the authority to conduct intelligence searches even when the national security purpose is secondary to criminal prosecution." Letter from Assistant Attorney General Dan Bryant to the Chairs and Ranking Members of the House and Senate Judiciary and Intelligence Committees, October 1, 2001 (page 13).

Finally, outside media observers were aware of, and reported, the implications of the "significant purpose" amendment while the Patriot Act was under consideration. As Congressional Quarterly reported separately on October 8, 9, and 23, 2001: "Under the measure, for example, law enforcement could carry out a FISA operation even if the primary purpose was a criminal investigation." Congressional Quarterly, House Action Reports, Fact Sheet No. 107-33 (Oct. 9, 2001), at page 3; see Congressional Quarterly, House Action Reports, Legislative Week (Oct. 23, 2001), at page 3; Congressional Quarterly, House Action Reports, Legislative Week (October 8, 2001), at page13.

Ultimately, the courts will decide whether or not the government's legal arguments are persuasive. Those who claim that Congress never envisioned those legal arguments, however, face a steep uphill battle in light of the historical record.

Implications of the Government's Legal Arguments

Having outlined our basic legal arguments, and their support in the Patriot Act, let me make a few observation about the effect those arguments will have at ground level. Of course, predictions are limited because we have not yet been able to implement the Patriot Act's "purpose" and "coordination" amendments.

As I mentioned, under pre-Patriot Act law, the courts treated "foreign

intelligence information" as if it excluded information sought for use in a criminal prosecution, apparently even if the prosecution was itself designed to protect national security against foreign threats – e.g., the prosecution of Robert Hanssen for espionage. That does not mean, however, that the government did not monitor persons such as Robert Hanssen. On the contrary, we did monitor them, albeit not for the primary purpose of prosecuting them. Even if our purpose is allowed to change, however, the scope of the surveillance will not change. As the FISC recognized in its May 17 opinion, the information sought by law enforcement officials for the prosecution of a spy or terrorist is essentially the same as the information sought by intelligence agents for a traditional counterintelligence investigation under FISA. See FISC May 17, 2002 opinion at 10 (second-to-last bullet point), 25 (first bullet point). Congress also understood that congruence when it enacted FISA in 1978. See House Report 49, 62 ("evidence of certain crimes like espionage would itself constitute 'foreign intelligence information' as defined"). A good criminal-espionage investigation requires essentially the same information as a good counterintelligence-espionage investigation. Thus, under the Patriot Act, our purpose may change, but we will still be seeking and collecting the same information as before.

We also claim, as a result of the "significant purpose" amendment, that FISA may be used primarily for a law enforcement purpose of any sort, as long as a significant foreign intelligence purpose remains. Considered in context, with the rest of FISA's provisions, judicial approval of this argument will also not radically change the scope of surveillance. There are several reasons why this is true:

First, of course, the "significant purpose" amendment will not and cannot change who the government may monitor. Domestic criminals – e.g., corrupt Enron executives, Bonnie and Clyde, Sammy "the Bull" Gravano, and Timothy McVeigh – cannot be FISA targets because they are not agents of foreign powers as defined by 50 U.S.C. § 1801(b). Regardless of the government's purpose, these targets simply do not satisfy FISA's probable cause requirements because they are not agents of a foreign power.

Indeed, such persons are immune from FISA for another reason: There would be no foreign intelligence purpose for monitoring them, and FISA still requires a "significant" foreign intelligence purpose. Thus, both before and after the Patriot Act, FISA can be used only against foreign powers and their agents, and

only where there is at least a significant foreign intelligence purpose for the surveillance. Let me repeat for emphasis: We cannot monitor anyone today whom we could not have monitored at this time last year.

That means we are considering only a very small subset of cases in which the FISA target is an agent of a foreign power – e.g., is knowingly engaged in international terrorism on behalf of an international terrorist group – and is also committing a serious but wholly unrelated crime. In other words, we are talking about international terrorists who also engage in insider trading to line their own pockets (not to finance their terrorism), or spies who also market child pornography. I do not say that such cases could never arise; I do say that they do not arise very often. Especially in the case of U.S. persons, most agents of foreign powers are too busy carrying out their foreign intelligence missions to find time to dabble in serious but unrelated crime.

It is important to note, however, that even where such persons exist, we have always been allowed to monitor them, and we have always been allowed to share with prosecutors evidence of their unrelated crimes. See 50 U.S.C. § 1801(h)(3). Indeed, it is ironic that, because of the way courts have interpreted the term "foreign intelligence information," the government's right to share information concerning an unrelated crime was more clearly established under 50 U.S.C. § 1801(h)(3) than was the government's right to share information concerning terrorism and espionage offenses under 50 U.S.C. § 1801(h)(1). See House Report 62 (making clear that the right to share evidence of a crime with prosecutors under 50 U.S.C. § 1801(h)(3) applies only to crimes that are unrelated to the target's foreign intelligence activities). In such cases, therefore, the only real requirement changed by the Patriot Act was the one that prevented prosecutors from giving advice designed to enhance the possibility of a prosecution for the unrelated crime. The USA Patriot Act allows prosecutors to give more advice in such cases, but (with the caveat about predictions noted above) its effect on the scope of surveillance should be – at most – quite modest. Thus, while not changing who will be subject to FISA surveillance, the "significant purpose" amendment does provide a substantial benefit by allowing prosecutors and intelligence investigators to share information and advice to best coordinate their overall efforts.

Accuracy

Finally, there is the question of accuracy. The FISC's May 17 opinion describes

two sets of FISA cases in which accuracy problems arose. I cannot discuss specifics, but I can say that the two sets of cases were unrelated. In response to these errors, the Department adopted both a short-term and a long-term response.

In the short term, we began by immediately correcting the mistakes with the court. Indeed, the FISC learned of the errors only because we brought them to its attention. We also advised the Congressional Intelligence Committees, consistent with our statutory obligation to keep them "fully inform[ed]" about the use of FISA. 50 U.S.C. § 1808(a). Finally, as the FISC's opinion reveals, the Department's Office of Professional Responsibility (OPR) opened an investigation, which is still pending, and in accord with Department policy, I will not comment on it.

For the long term, we tried to understand the structural reasons that led to inaccuracies. Here is what we discovered: The main challenge to accuracy in FISA applications is that the FBI agent who signs the affidavit describing the investigation for the court is not the agent who actually conducts the investigation. That is true because of the nature of counterintelligence investigations and FISA. By definition, every FISA investigation – an investigation in which FISA is used – is both national and international in scope, involving hostile foreign powers that target this country as a whole. As a result, any given FISA target may be part of an investigation that takes place simultaneously in, for example, New York, Los Angeles, Boston, and Houston.

Although the investigations take place all over the country, FISA applications are prepared, certified, approved, and filed with the FISC exclusively in Washington, D.C. As a result, the person who signs the FISA declaration and swears to it in the FISC is an FBI headquarters supervisor, who coordinates, but does not conduct, the field investigations he is describing for the court in his affidavit. And that is where inaccuracy can creep in: If the headquarters agent has a miscommunication with the agents in the field, his affidavit will be inaccurate.

Given that diagnosis of the problem, the solution followed logically: Require better communication between headquarters and the field. On April 5, 2001, the FBI adopted new procedures, referred to now as the "Woods Procedures," to accomplish that. The Woods Procedures are long and complex, but their basic requirement is for field agents to review and approve the accuracy of FISA

applications that describe investigations occurring in their offices. In the same spirit, the Attorney General issued a memorandum in May 2001 requiring direct contact between DOJ attorneys and FBI field agents, and imposing certain other reforms as well. Both the Woods Procedures and the May 18 memo are unclassified and have previously been provided to the Committee.

I am pleased to say that the accuracy reforms have brought improved results. Perhaps the best unclassified evidence for that is a public speech given by the Presiding Judge of the FISC in April of this year, in which he said, among other things, that "we consistently find the [FISA] applications 'well-scrubbed' by the Attorney General and his staff before they are presented to us," and that "the process is working. It is working in part because the Attorney General is conscientiously doing his job, as is his staff." It was particularly gratifying to hear the judge compliment the FBI. He said: "I am personally proud to be a part of this process, and to be witness to the dedicated and conscientious work of the FBI, NSA, CIA, and Justice Department officials and agents who are doing a truly outstanding job for all of us."

As I said, these are complex issues, and I will be happy now to answer your questions. Thank you.

because many knowledgeable people from within and without the government committed themselves, through informal and private discussions, to finding solutions that respected both the demands of national security and the imperatives of civil liberties. I am convinced that similarly appropriate solutions can be found to the new problems created by the grave threat of international terrorism if the same methods are followed. I stand ready, as I am sure others do, to assist in that process in any way that I can.

I would now be pleased to respond to your questions.

Testimony
United States Senate Committee on the Judiciary
The USA PATRIOT Act In Practice: Shedding Light on the FISA Process.
September 10, 2002

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The Delicate – and Difficult – Balance of Intelligence and Criminal Prosecution Interests in the Foreign Intelligence Surveillance Act

Mr. Chairman and Member of the Committee, I appreciate the invitation to appear before the Committee to discuss an issue of considerable significance to our Nation: how should we balance the differing, and often overlapping, goals of protecting national security from hostile acts of foreign powers and enforcing criminal laws. My goal is to share with the Committee the Department of Justice's perspective at the time of the enactment and implementation of the Foreign Intelligence Surveillance Act of 1978, to review the evolution of that perspective over the past two decades and to discuss what this Committee, the Department of Justice and the Foreign Intelligence Surveillance Court should do in post-9/11 environment.

I want to caveat my remarks with an essential fact. Any evaluation of what "should" be done must be based on a thorough understanding of what "has" been done in the past. The legal and policy principles at the heart of the current debate reflect years of secret activity in the implementation of FISA. I was personally aware of that activity for only a few years preceding and immediately following passage of FISA. I have endeavored to stay informed about these issues since I left the Department in 1981, but I have not had access to the most critical facts that remain within the classified written and unwritten history of FISA as reflected in FISA applications, hearings, FISC orders and executive deliberations. I am aware that this Committee is, to some extent, burdened with the same limitations. It is entirely possible that my views on what ought to be done now would change if I had access to the full historical record. Despite that limitation, I believe any consideration by the Committee should include the "original understanding." I hope today to convey that understanding and provide suggestions based on that history in light of recent events.

I. The Original Understanding

The perspective that surrounded the passage and initial implementation of FISA

was significantly influenced by the events that lead to the creation of the Office of Intelligence Policy and Review and the passage of FISA itself. For many years the Executive Branch had engaged in electronic surveillance of certain targets without a judicial warrant and in reliance on an assertion of the inherent authority of the President as Commander-in-Chief to take acts necessary to protect national security. During the Vietnam War that established practice was invoked to undertake warrantless surveillance of a number of anti war individuals and groups on a belief that their activities threatened national security. In some cases those surveillance targets were domestic groups with no provable ties to any foreign interest. One such surveillance came before the Supreme Court in United States v. United States District Court, 407 U.S. 297 (1972). In that case, commonly referred to as the Keith decision, the Court held that the Nixon Administration's warrantless surveillance "to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of Government" violated the Fourth Amendment. Id. at 300, emphasis added. The Court eschewed a "precise definition" but stated that term "domestic organization" meant "a group or organization (whether formally or informally constituted) composed of citizens of the United States and which has no significant connection with a foreign power, its agents or agencies." Id. at 309, n.8, emphasis added. The Keith decision and subsequent revelations during the Watergate investigations lead to an effort that began in the Ford Administration to create a Foreign Intelligence Surveillance Court to issue judicial warrants for national security investigations.

When I joined the Department of Justice in the Carter Administration as a senior lawyer in the Office of Legal Counsel, I assumed responsibilities for certain "national security" functions that soon resulted in the creation of the Office of Intelligence Policy and Review that I headed. The Administration was committed to enactment of what became FISA. We took the Keith case as our fundamental guidance on the limits of any warrantless national security surveillance.

During our tenure the Department learned that a Vietnamese citizen in the United States was sending packages to Paris through a courier who happened to be a CIA agent. In Paris the documents were delivered to an official of the Vietnamese government. We were asked to approve a warrantless search of one of the packages. On the basis of the information then available to us, we declined to advise the Attorney General that we should invoke the foreign intelligence exception and engage in warrantless physical searches of the packages if there was a reasonable expectation of privacy. We did, however,

conclude that the specific package in the courier's possession was not protected by any reasonable privacy expectation and a search even in the context of a criminal investigation would not require a warrant. We thus authorized the courier to open the package and inspect its contents. That inspection revealed that classified government documents were indeed being transferred to a Vietnamese official in Paris. On the basis of that information and other investigations, we subsequently advised the Attorney General to obtain the President's personal approval of subsequent searches of packages that were, in our opinion, protected by a reasonable expectation of privacy. In addition to those physical search authorizations, the Attorney General approved installation of a wiretap of the individual's phone. Eventually we learned that the source of the classified documents was a U.S. citizen employed by the United States Information Agency. The Attorney General also approved installation of covert television surveillance of the citizen's USIA office.

Throughout investigation, the Criminal Division was informed of its status. Eventually the President accepted Attorney General Bell's advice that we should prosecute the Vietnamese individual and the U.S. citizen. They were arrested and indicted in January 1978. Their trial lawyers challenged the legality of the initial package inspection as well as the subsequent Presidential authorizations for physical searches and electronic surveillance. The District Court held an evidentiary hearing and ruled that the initial package inspection was constitutional because there was no reasonable expectation of privacy and that subsequent searches and surveillance authorized by the President did not violate the Fourth Amendment under the Keith test. However, the District Court also found, on the basis of certain Criminal Division memoranda, that the investigation became "primarily a criminal investigation" on July 20, 1977 and suppressed evidence obtained from warrantless searches and surveillance after that date.

Both defendants were convicted and appealed. They contended that the original package inspection was unconstitutional and that the President did not have inherent authority to approve the subsequent searches and surveillance. I argued on appeal that the District Court correctly upheld the validity of the early searches, but had erroneously adopted the "primary purpose" test to suppress evidence obtained after July 20. The Fourth Circuit characterized our position as contending "that, if surveillance is to any degree directed at gathering foreign intelligence, the executive may ignore the warrant requirement of the Fourth Amendment." United States v. Troung Dinh Hung, 629 F.2d 908, 915 (1980). The defendants argued that the foreign intelligence exception to the warrant

requirement could not be invoked unless the search was conducted "solely" for foreign policy purposes. The Court of Appeals rejected both arguments and affirmed the District Court's reliance on the "primary purpose" test.

FISA was enacted during the pendency of the Troung appeal. As passed, the Act included a requirement that "an executive branch official . . . designated by the President from among those executive branch officers employed in the area of national security [certify] that the purpose of the [FISA] search is to obtain foreign intelligence information." 50 U.S.C. § 1823(a)(7), as originally enacted. Over the years the language of the Act and the Troung decision evolved into the adoption of a "primary purpose" test in the administration of FISA that resulted in the creation in 1995 of a "wall" of separation between intelligence and law enforcement. That wall in turn lead to the amendments in the PATRIOT Act changing the relevant language from "the purpose" to "a significant purpose."

I am not privy to all the actions that led the Department, the FBI and the FISC to implement that "wall." I am confident, however, that the post-1995 strict separation was not consistent with the view we held in the beginning. I also believe the "wall" reflects an erroneous view of the 1978 Act and the court decisions.

The Troung decision involved searches and surveillances undertaken without any prior judicial approval. Since passage of FISA, similar searches have been authorized by an Article III judge under the FISA procedures. That critical different was, in my view, overlooked in the creation of the "wall." The Troung court was concerned with the limits of warrantless surveillance in a prosecution context. That concern is absent whenever a FISA order has been issued. Thus the basis for concern about the "primary purpose" of an FBI surveillance is not present when a FISA order has been obtained. For me the FISA order is a warrant within the meaning of the Fourth Amendment, as long as the purpose of the surveillance is to obtain foreign intelligence, as that term is defined in FISA itself.

The evolution of the "primary purpose" test reflects confusion between the purpose of the surveillance and the motivating cause of the surveillance. Admittedly we were never faced with a terrorist environment like today's post 9/11 concerns. We did have international terrorist cases, but those cases rarely involved any threat of criminal activities in the United States. Our focus was on international terrorist organizations whose violent activities were directed to foreign targets and also engaged in fund-raising and other activities in the United States. As the Committee knows, the term "foreign intelligence" in FISA was intentionally drafted to include information about criminal and non-

criminal activities of agents of foreign powers. That information would normally be of interest to the national security/foreign affairs community. To the extent that information implicated criminal concerns, it was overwhelmingly in the arena of espionage, not terrorism.

Against that backdrop we never engaged in any analysis of the "primary purpose" of a FISA surveillance. We were totally comfortable with an understanding that if the purpose for undertaking the surveillance was to gather information about the activities of agents of foreign powers that was not otherwise obtainable, then "the purpose" of the surveillance was to gather foreign intelligence. The subsequent use of that information, at least insofar as it concerned U.S. persons, was governed by the minimization procedures. Dissemination and use of the information for criminal law enforcement purposes was expressly authorized by FISA and that use did not, to us, affect "the purpose" of the surveillance. This view did not, however, mean that we would have authorized a FISA application that had its origin entirely within the law enforcement community with no prior involvement of an official in the intelligence community, had such a case ever arisen.

For me the key provision in FISA is not the "purpose" language, but the certification language that restricts authority to Executive Branch officials "employed in the area of national security." Given the background of FISA, particularly the Supreme Court's Keith decision, that provision was a clear indication that the FISA authority was to be exercised when an official with national security responsibilities certified that there was a national security reason to undertake the surveillance. The delegations of authority by successive Presidents have always included the top officials in what we all recognize as the intelligence/national security community. The problem arises because of the counterintelligence and law enforcement responsibilities of the FBI. Because the Bureau has both responsibilities, the Director is both an intelligence official and a law enforcement official.

Although FISA does not explicitly limit certifications by the FBI Director to exercises of his "intelligence" responsibilities, we had always understood the fundamental purpose of FISA surveillances to be limited by the Keith principle. Thus a "pure law enforcement" investigation was to be handled using traditional law enforcement authorities, such as Title III. We never viewed FISA as an alternative to Title III for such cases. At the same time we never believed that FISA precluded applications where the ultimate use of the information gathered would be criminal prosecution. As long as the investigation related to a matter of concern to the national security community and the information sought met

the FISA definition of foreign intelligence, the statutory requirements were met. Thus for us the phrase "purpose" referred to the goal of the surveillance itself, not the goal of the broader investigation. By definition, at least during the Carter Administration, counterintelligence investigations of U.S. persons always contemplated a possible criminal prosecution. But that reality did not mean that the purpose of the FISA surveillance was law enforcement. The purpose was to gather foreign intelligence information about the activities of the U.S. person. That purpose remained the same throughout the course of surveillance, even if there was a decision to undertake a criminal prosecution instead of a non-prosecutorial solution such as a false-flag or "turning" operation.

II. Evolution of "the Primary Purpose" Concern

It is now apparent that our original understanding has not been followed in recent times. Until the past few years when the Lee/Bellows investigation and other disclosures have brought the issue forward, the evolving attitudes remained hidden from public view. There were several judicial decisions upholding FISA surveillances, and a few of them made reference to the "purpose" or "primary purpose" of FISA surveillances. It is now clear that the Department and the FISC read those decisions as requiring creation of a "wall" between the intelligence and the law enforcement responsibilities of the FBI and the Department. As I read those decisions, none of them required the adoption of the 1995 procedures. Certainly the Supreme Court never addressed the issue and there was a clear divergence of views among the circuits. For reasons that remain hidden in the classified FISA files and the institutional memory of the participants, what emerged was the July, 1995 directive from the Attorney General that sharing of FISA information with law enforcement officials of the FBI and the Criminal Division must not "inadvertently result in ether the fact or the appearance of the Criminal Division's directing or controlling the FI or FCI investigation toward law enforcement objectives." Those procedures also mandated the inclusion in FISA renewal applications of a disclosure to the FISC of "any contacts among the FBI, the Criminal Division, and a U.S. Attorney's Office, in order to keep the FISC informed of the criminal justice aspects of the ongoing investigation."

The reasons for that directive remain a mystery. But for me the 1995 directive was not required either by FISA as it was originally enacted or by the reported decisions of any court. It is unclear whether the 1995 procedures originated with the Department, the FISC or some other institution. It is, however, clear that the directive was not subsequently followed, that numerous instances of that failure

were disclosed to the FISC, that the FISC became quite concerned about these violations, that a senior FBI official was disciplined and that the FISC has now refused to approve the Department's effort to change those procedures as the Department believes it need to do.

Based on the public materials, I see no basis in FISA or judicial decisions for imposing the 1995 limitations. There may well be valid policy reasons or specific classified DOJ or FISC actions that led the Department to adopt the 1995 procedures. The Committee should, I believe, try to determine precisely why the procedures were adopted. But regardless of those reasons, it is clear to me that the 1995 procedures reflect an understanding of FISA's requirements that is far more restrictive than our original understanding.

III. The PATRIOT Act Response

Congress changed the FISA language from "the purpose" to "a significant purpose" in two subsections of FISA. It did not, however, change all occurrences of the phrase and that action has contributed to the current FISC/DOJ impasse. Moreover, the atmosphere surrounding passage of the PATRIOT Act and its sparse legislative history makes it difficult to be confident about any correct legal interpretation of the effect of that Act on the 1995 procedures. The Department believes that the change justifies tearing down the 1995 wall and authorizes FISA surveillances where "the primary purpose" is criminal law enforcement. The FISC, on the other hand, unanimously concluded that the amendments did not justify eliminating the 1995 restrictions.

From my observation of the PATRIOT Act's passage, it appears there is support in the legislative debates for the Department's view. However, the specific issues involved in the Department's appeal to the Court of Review do not appear to have been fully understood or addressed by the Congress. It is plain beyond debate that Congress intended to facilitate increased information-sharing between the intelligence and law enforcement communities. It is equally plain that Congress intended to eliminate the "primary purpose" gloss that had encrusted FISA over the years. It is not at all clear that Congress intended to change the process to the extent the Department now seeks.

IV. Recommendations

With full awareness of the limitations on my knowledge of the classified facts, I advance a few specific recommendations:

A. Obtain More Information and Make it Public

The Committee should ensure that t has a full and complete understanding of

the reasons that led to the promulgation of the 1995 procedures and the pre- and post-1995 incidents with the FISC that led to the FISC decision to bar future appearances before it of a particular FBI agent.

The Committee needs to learn whether the present DOJ appeal to the Court of Review was based on an actual impairment of the FBI's ability to protect the national security or a more abstract concern about the proper interpretation of the PATRIOT Act. For that reason the Committee, either directly or through the Intelligence Committee, needs access to an unredacted version of the Department's brief on appeal.

The Committee should also meet with one or more judges of the FISC to obtain their perspective on how the 1995 procedures and the "wall" developed. I understand that the FISC may be concerned about such a meeting because of separation of powers concerns. It is entirely appropriate for traditional courts to address the other branches solely through published opinions and thus decline a congressional request to meet to discuss legal issues that tribunal has decided. But the FISC is not a traditional court that publishes opinions. It works, and properly so, in a classified environment. There are no published opinions that explain what the FISC believes the "primary purpose" principle requires a wall between the intelligence and law enforcement functions. There is no public opinion explaining the numerous departures from the 1995 procedures that lead to the FISC's order barring the FBI agent from appearing before it. Finally, it appears that the FISC has not been precluded by separation of powers concerns from full and open communications and meetings with the executive branch. Given the unique business of that court and the congressional need to obtain a complete perspective on this issue, the Committee and the FISC should find some means for a full and frank dialogue.

To the fullest possible extent, the Committee should make this information public, recognizing legitimate concerns about disclosing case-specific information, but erring on the side of disclosure rather than continued secrecy.

B. Introduce Elements of an Adversarial Process for FISA

I have previously advocated appointment of counsel to serve as a "devil's advocate" for U.S. persons who are targets of FISA applications. I believe any process that departs from our normal adversary proceedings is subject to increased risk of error. When there is no counsel on "the other side," the court

finds itself in an uncomfortable position of being critic as well as judge. I believe the May 17, 2002 amended decision and order of the FISC reflects the built-up tension in that Court's role, a tension exacerbated by the total absence of an adversarial process.

I do not suggest that counsel for the target be used in non-U.S. person cases, nor even in all U.S.-person cases. Nor would I have counsel communicate with the target. Indeed it might be possible to eliminate certain target-identifying information from the pleadings disclosed to cleared counsel. But I believe the FISA process would be enhanced if the FISC in certain cases appointed a lawyer with the requisite background to review the FISA filing and interpose objections as appropriate. I think the FISC, as an Article III court has the inherent authority to make such appointments now. But Congress could facilitate that outcome by specific authorizing amendments to FISA.

I had hoped that the Court of Review would appoint counsel to serve as amicus curiae to defend the FISC order and decision in the present appeal. I am aware that petitions to intervene were filed by public interest organizations. Unfortunately the Court of Review proceeded to hear arguments yesterday in a closed proceeding. The secrecy of that hearing and the absence of any meaningful adversary process diminished the quality – as well as the public acceptability – of the Court's ultimate decision.

C. Insure that the Office of Intelligence Policy and Review Remains Fully Involved

One of the less-well-publicized aspects of the FISC May 17 order is the preservation of the role of OIPR as a full participant in the exchange of information between the intelligence and law enforcement components. The Department's public disclosures on this aspect of their proposed new procedures provide absolutely no explanation for the change. The Department has deleted every part of its argument on this point in its redacted brief.

OIPR has played an important role throughout FISA as part of the internal "checks and balances" to offset features of FISA that depart from the criminal search warrant standards. The Department has not stated publicly why OIPR's role needs to be changed. I understand that they have stated "off the record" that it is "administratively difficult or inconvenient" to require OIPR's presence under the 1995 procedures and the FISC's amendment to the new procedures.

That justification, if it is indeed the reason, is unpersuasive. Here again there may be legitimately classified reasons to support the Department's position. If so, this Committee should obtain access to those reasons and make an independent evaluation of the validity of the proposed change. If there is in fact some limitation of human or physical resources that led to the proposed curtailing of OIPR's role, Congress should provide the needed resources to insure the Office continues to function both as advocate for FISA applications and as watchdog.

D. Do Not Change the FISA "Agent of a Foreign Power" Definition

As noted earlier, the Keith "agent of a foreign power" principle was the overriding jurisprudential concept on which FISA was based. In essence, if activities were being undertaken on behalf of a foreign power, they were appropriate for consideration by the national security/intelligence components of the government, but if there was no such agency, the matter was one for domestic law enforcement and not an assertion of inherent Commander-in-Chief authority. Domestic law enforcement surveillances were to be left to Title III warrants, while national security/intelligence surveillances were to proceed using FISA warrants.

In the aftermath of 9/11 there have been some proposals to amend FISA to delete the "agent of a foreign power" limitation, at least with regard to non-U.S. persons. That proposal would fundamentally change the basic concept of FISA and transform it from a foreign affairs/national security intelligence tool to a criminal intelligence tool. That change would, in my opinion, unnecessarily blur the already difficult line between the intelligence and law enforcement communities. It would also institutionalize an alienage-based distinction of considerable significance.

In a given case where there is no basis to allege that a particular individual is acting as an agent of a foreign power, the matter is rarely going to be of concern to the National Security Council, the Department of State and the Department of Defense. Absent an interest from one of those components, there is no legitimate foreign intelligence interest and no reason to authorize FISA surveillance.

E. Change FISC Rule 11

In April 2002 the FISC adopted Rule 11 requiring all FISA applications to include "informative descriptions of any ongoing criminal investigations of FISA targets, as well as the substance of any consultations between the FBI and criminal prosecutors at the department of Justice or a United States Attorney's Office. I believe that requirement is unsound and goes well beyond any appropriate role of the FISC.

I recognize the FISC has a duty to oversee the implementation of minimization procedures. That duty properly includes reports of dissemination of information obtained through FISA surveillances and searches. But Rule 11 is not limited to dissemination of FISA-derived information. Rule 11 requires comprehensive reporting on all aspects of any criminal investigation involving a FISA target. That requirement injects the FISC far too deeply into criminal investigations. It amounts to a comprehensive contemporaneous oversight of certain criminal investigations and prosecutorial decisions. That is not an appropriate role for an Article III court. Investigation and prosecution of crimes is an executive, not judicial, function. Rule 11 should accordingly be substantially revised to limit any reports to those needed to monitor implementation of minimization procedures.

Testimony
United States Senate Committee on the Judiciary
The USA PATRIOT Act In Practice: Shedding Light on the FISA Process.
September 10, 2002

Prof. William C. Banks
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STATEMENT OF PROFESSOR WILLIAM C. BANKS

Thirty years ago the Supreme Court first confronted the tensions between unmonitored executive surveillance and individual freedoms in the national security setting. United States v. United States District Court (Keith) arose from a criminal proceeding in which the United States charged three defendants with conspiracy to destroy government property – the dynamite bombing of a CIA office in Ann Arbor, Michigan. During pretrial proceedings, the defendants moved to compel disclosure of electronic surveillance. The Government admitted that a warrantless wiretap had intercepted conversations involving the defendants. In the Supreme Court, the government defended its actions on the basis of the Constitution and a national security disclaimer in the 1968 Crime Control Act. Justice Powell's opinion for the Court first rejected the statutory argument and found that the Crime Control Act disclaimer of any intention to legislate regarding national security surveillance simply left presidential powers in the area untouched.

Turning to the constitutional claim, the Court found authority for national security surveillance implicit in the President's Article II Oath Clause, which includes the power "to protect our Government against those who would subvert or overthrow it by unlawful means." However, the "broader spirit" of the Fourth Amendment, and "the convergence of First and Fourth Amendment values" in national security wiretapping cases made the Court especially wary of possible abuses of the national security power. Justice Powell then proceeded to balance "the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression." Waiving the Fourth Amendment probable cause requirement could lead the executive to "yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." Although the government argued for an exception to the warrant requirement, citing the unique characteristics of ongoing national security surveillance, and the fear that leaks could endanger sources and methods of intelligence

gathering, Justice Powell answered that the potential for abuse of the surveillance power in this setting, along with the capacity of the judiciary to manage sensitive information in ex parte proceedings, rendered any inconvenience to the government "justified in a free society to protect constitutional values."

Justice Powell was careful to emphasize that the case involved only the domestic aspects of national security, and that the Court was not expressing an opinion on the discretion to conduct surveillance when foreign powers or their agents are targeted. Finally, the Court left open the possibility that different warrant standards and procedures than those required in normal criminal investigations might be applicable in a national security investigation:

We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of 'ordinary crime.' The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

The Court implicitly invited Congress to promulgate a set of standards for such surveillance:

Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of the citizen rights deserving protection.

Although Congress did not react immediately to Keith, Justice Powell's opinion provided an important impetus for the development of what became the Foreign Intelligence Surveillance Act of 1978 (FISA). Like the Supreme Court, Congress recognized that warrantless surveillance by the executive branch untethered by law could undermine important constitutional values at the confluence of the First and Fourth Amendments. At the same time, Congress came to appreciate that the nature and purpose of intelligence investigations differs considerably from criminal law enforcement investigations. As such, the traditional warrant requirement as practiced by law enforcement might not be the best model for assuring that the balance of security and liberty is fairly

struck in national security investigations.

The system that emerged through twenty-four years of practice under FISA has been repeatedly construed by the federal courts as an adequate substitute for the law enforcement warrant to satisfy the "reasonableness" requirement of the Fourth Amendment. Central to the development of this body of case law upholding the FISA procedures has been the principal that FISA is designed for the gathering of foreign intelligence information and that any criminal prosecution that follows from surveillance undertaken pursuant to FISA has been incidental to the purpose of gathering foreign intelligence information. Although the "primary purpose" standard was developed by judges in pre-FISA judicial review of warrantless surveillance and does not appear as such in FISA, the "primary purpose" standard guided the implementation and review of FISA surveillance for twenty –three years. FISA seeks to ensure that its searches and surveillances are conducted for foreign intelligence purposes by requiring a senior-level certification of foreign intelligence purpose, and providing for limited judicial review of those certifications. Each certification must also designate the type of foreign intelligence information being sought, and explain the basis for this designation.

Admittedly, "primary purpose" is a qualitative standard that invites after-the-fact subjective judgments in evidentiary hearings, where judges are inclined to defer to the decisions of intelligence professionals. In addition, in the midst of an investigation, the need for speedy action, along with problems of coordination among the law enforcement and intelligence agencies, means that the intelligence professionals make the "primary purpose" calls, not a magistrate. The logic, however, is that once an investigation becomes primarily criminal in nature, the courts are entirely competent to make the usual probable cause determination when surveillance or search authority is sought, and individual privacy interests come to the fore when the government is attempting to form the basis for a criminal prosecution.

Criminal defendants have asserted many times since 1978 that FISC-approved surveillance was not for the primary purpose of foreign intelligence collection. In each such challenge, the federal courts have sustained the FISA surveillance under the "primary purpose" test. The government's defense in each case was aided by the prophylactic protection afforded by a FISC judge's prior approval of the surveillance as being in pursuit of foreign intelligence or foreign counterintelligence information.

The Intelligence/Law Enforcement Overlap

Even in 1978, the drafters of FISA understood that intelligence gathering and

law enforcement would overlap in practice. In the years since 1978, the reality of terrorism and the resulting confluence of intelligence gathering and law enforcement as elements of counter terrorism strategy has strained the FISA-inspired "wall" between intelligence and law enforcement. In addition, the enactment of dozens of criminal prohibitions on terrorist activities and espionage has added to the contexts in which surveillance may be simultaneously contemplated for intelligence gathering and law enforcement purposes.

In the weeks after September 11, the Justice Department pressed for greater authorities to conduct surveillance of would-be terrorists. Officials reasonably maintained that counter terrorism investigations are now expected to be simultaneously concerned with prevention of terrorist activities and apprehension of criminal terrorists. Surveillance of such targets is for overlapping purposes, both of critical importance. In the USA Patriot Act, Congress agreed to lower the barrier between law enforcement and intelligence gathering in seeking FISA surveillance. Instead of intelligence collection being the primary purpose of the surveillance, it now must be a "significant purpose" of the search or wiretap.

The statutory change may or may not have been necessary or even prudent. Whatever its wisdom, however, the "significant purpose" language does not mean that prosecutors can now run the FISA show. The FISA was largely untouched by the USA Patriot Act; its essence remains foreign intelligence collection. Greater information sharing and consultation was permitted between intelligence and law enforcement officials, but law enforcement officials are not permitted under "significant purpose" or any other part of FISA to direct or manage intelligence gathering for law enforcement purposes.

The May 2002 FISC Opinion

The concern exposed by the May 17 FISC opinion is easy to envision, stripping away the technical questions of statutory interpretation: Prosecutors may seek to use FISA to end-run the traditional law enforcement warrant procedures. They gain flexibility that way, but they also become less accountable, and any of us could be subject to surveillance and then arrested and detained without the protections afforded by the criminal justice system.

The May 17 FISC opinion, signed by all seven judges, is nuanced but firm in its partial repudiation of the proposed revised 2002 minimization procedures of the Department of Justice to effectively permit placement of supervision and control over FISA surveillance in the hands of law enforcement teams. Although it may have been preferable as a tactical matter for the FISC to respond directly to the

effect of the "significant purpose" amendment in the USA Patriot Act, the court was nonetheless on solid ground in concluding that the entire FISA, including its requirements for minimization procedures, continues to constitute a system for monitoring the gathering of foreign intelligence information. The Department of Justice based its proposed 2002 revisions to the minimization procedures on its understanding that the USA Patriot Act amendments to FISA permit FISA to be used primarily for a law enforcement purpose. As the FISC noted, portions of the Department's procedures would permit useful coordination among intelligence and law enforcement agencies to become subordination of the former to the latter.

The USA Patriot Act authorizes consultation between intelligence and law enforcement officers to "coordinate efforts to investigate or protect against foreign threats to national security." The limits drawn by the FISC opinion on Department of Justice procedures seek to assure that efforts to "coordinate" do not become a ruse for subordination. Without delving into the details of the minimization guidelines, it is fair to say that the modest restrictions imposed by the FISC follow reasonably from the court's conclusion that some of the Department of Justice proposals would have permitted the law enforcement officials to do more than engage in "consultations" with intelligence officials.

The Department of Justice Appeal to the Foreign Intelligence Surveillance Court of Review

The brief of the Department of Justice on appeal to the Foreign Intelligence Surveillance Court of Review is forcefully written. Its legal arguments are powerful. However, it is hardly the case as the brief maintains that the FISC was "plainly wrong." Although the USA Patriot Act did lower the wall between intelligence and law enforcement, it was not removed, and the essence of FISA as an exceptional procedure for the gathering of foreign intelligence information remains. In the end, the brief begs the question: If the FISC did not directly interpret the "significant purpose" change to FISA, precisely how does the USA Patriot Act affect the meaning of FISA? That fundamental question was answered, albeit implicitly, by the FISC. FISA continues to restrict the use of FISA procedures for law enforcement purposes. FISA is still fundamentally a mechanism for gaining access to foreign intelligence information. Each of the statutory definitions of "foreign intelligence information" pertain to categories of intelligence that may further the counter terrorism goals of law enforcement, but each definition requires that the surveillance be for "information" that furthers these purposes. "Obtaining evidence for conviction" is something different from "obtaining foreign intelligence information," even if the

conviction will deter terrorism. The change in FISA from "purpose" to "significant purpose" acknowledges the evolving interconnectedness of intelligence gathering and law enforcement as counter terrorism tools, but there is no indication in the USA Patriot Act that the fundamental purpose of FISA was altered.

Although the Department of Justice brief notes that FISA must be read as a whole, not in bits and pieces, the brief does just what it cautions against. For example, the brief notes that the definition of "foreign intelligence information" does not limit how the government may use the information to protect against threats to the national security. However, as the FISC explained, other parts of FISA, including the minimization requirements, do so limit the government. Similarly, the Department of Justice is correct to assert that "foreign intelligence information" may be used for a law enforcement purpose, but the information may only be used according to the other requirements of FISA, including minimization. Finally, while the USA Patriot Act expressly authorizes consultation and coordination between intelligence and law enforcement officials, the Act also expressly continues to place intelligence officials as those in charge who will do the consulting and information sharing with law enforcement officials.

The Constitution as construed by the Supreme Court in Keith also supports the continuing legal obligation to balance carefully intelligence gathering and law enforcement investigations. The Department of Justice brief inaccurately characterizes the Keith decision as drawing the constitutional boundaries for surveillance on the basis of the "nature of the threat, not the nature of the government's response to that threat." Both elements figured in the balancing formula in Keith. As noted above, the Court recognized that different standards may be constitutional "if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens." The government's duty to protect the national security was pitted against the danger that untethered executive surveillance would abuse individual rights.

The Keith Court supported an exception to the warrant requirements because it is reasonable to use other procedures in pursuit of intelligence information. FISA occupied the exception recognized by the Supreme Court, leaving the law enforcement model in place. Although it is common to refer to what the FISC issues as "warrants," they have that label not because they are Fourth Amendment warrants, but because the FISC permits the type of surveillance associated with a Title III warrant. Allowing the government to employ FISA to

enforce the criminal laws would therefore also be unconstitutional, in violation of the Fourth Amendment.

Why should we care what the primary or even a significant purpose of surveillance is? Why should intelligence gathering and law enforcement investigations be subject to different rules? First, collection of foreign intelligence information is designed to head-off a threat to national security, while law enforcement collection has traditionally been after-the-fact, to identify perpetrators of completed crimes. (Terrorism is admittedly a different kind of crime that has forced all of us to confront a complex range of authority and rights problems.) Foreign intelligence is also sometimes sought simply to keep tabs on foreign groups, absent any anticipated criminal activity. Foreign intelligence gathering is therefore sometimes less specific and more programmatic than law enforcement collection. In addition, foreign intelligence information may also be harder for someone outside the intelligence community to evaluate. Pieces may be understood only as part of a mosaic of information, by contrast to the often more specific, historical information obtained for particular law enforcement purposes. Traditional standards of probable cause are thus inappropriate for foreign intelligence gathering.

It is not accurate to claim, as the brief does, that before the USA Patriot Act the federal courts treated law enforcement and intelligence gathering purposes "as if the two terms are mutually exclusive." Instead, the "primary purpose" standard was developed with care by judges reviewing criminal defendants' claims that FISA surveillance tainted the prosecution in violation of the Fourth Amendment. The standard recognized the frequent overlap of law enforcement and intelligence operations, and sought to draw a reasonable line to guide law enforcement and intelligence officials as they manage parallel investigations. Although the USA Patriot Act amendment required only that the surveillance have a "significant" intelligence purpose, nothing else in the USA Patriot Act or in FISA forgives the required review of consultations between intelligence and law enforcement officials, much less the finding made by the FISC in each case that the surveillance approved is in pursuit of foreign intelligence information.

Continuing Congressional Oversight

It is impossible for any academic to opine intelligently about what goes on in working with FISA. Its proceedings are secret, little reporting is done, and only rarely does any FISA surveillance reach the public eye. We outsiders simply do not know enough to offer a detailed critique of the procedures for implementing FISA, pre or post-USA Patriot Act. Of course our relative ignorance can be remedied, at least in part, by providing more information about the

implementation of FISA. Now that some of the guidelines have been disclosed during this dispute, why not assure that all such guidelines are publicly reported, redacted as necessary to protect classified information or intelligence sources and methods. The reporting that now occurs is bare-bones, limited to a simple aggregate number of applications each year with no further detail. Why not report with appropriate break-downs for electronic surveillance and searches, numbers of targets, numbers of roving wiretaps, how many targets of FISA were prosecuted, how many were U.S. persons. The reports should also be available more often than annually.

In addition, among the reforms to FISA that the Judiciary Committee could consider would be a formal role for the FISC in reviewing and approving FISA guidelines, akin to the role the Supreme Court assumes in reviewing the Rules of Civil Procedure and Rules of Evidence. The FISC is, of course, an Article III court, and the Judiciary Committee is thus centrally responsible for its oversight, even if its work concerns intelligence.

Moreover, the appeal of the FISC decision lays bear the one-sided nature of FISA proceedings. Now that the government has lost a case and has exercised its statutory right of appeal, who will represent the FISC on appeal? As the statute now stands, no one speaks for the FISC. The Judiciary Committee may consider an amendment to FISA that permits the creation of a list of security-cleared counsel who could brief and argue any subsequent appeals from the FISC.

Conclusions

Government works best when the branches work together. The rare glimpse at the secret surveillance mechanism afforded by the release of the May 17 FISC opinion and attendant correspondence has shown that the changing U.S. environment for counter terrorism demands that all the principal government actors must cooperate in reforming a system for such surveillance that keeps us safe and free. Recent developments have exposed some dissonance among those responsible for making FISA attain its aim of granting extraordinary access to intelligence information in the hands of those who would plot against the United States, while protecting the First and Fourth Amendment rights of all persons. Congress should do what it can to enable the government to speak with one voice in national security surveillance, to keep us safe and free.

Testimony
United States Senate Committee on the Judiciary
The USA PATRIOT Act In Practice: Shedding Light on the FISA Process.
September 10, 2002

Mr. Morton H. Halperin
Director, Washington Office , Open Society Institute

Mr. Chairman,

I am very pleased to have been asked by this Committee to testify about FISA. This is not the first time I have done so. As you know, I was part of a panel that discussed aspects of the anti-terrorism legislation enacted after 9/11. I also testified numerous times before this Committee and others in the House and Senate when FISA was first proposed. At the end of a very long and careful process, we arrived at a bill which correctly balanced the needs of national security with individual liberty and which passed with overwhelming support. I urged Congress to pass that legislation and still believe that it was in the national interest.

What we have learned recently about the activities of the FISA court vindicates the view of those of us who argued that Article III judges would take their role seriously and would, in ex-parte situations, ensure that constitutional rights were protected. The judicial oversight process of FISA is working well and any proposals for change should be considered with measured care.

I testified last year against the proposal to change the “the purpose” language. I continue to believe that the “significant purpose” standard, as interpreted by the Justice Department, is unconstitutional. The FISA court, reading the statute as a whole with the imperative of interpreting it in a way that avoids reaching constitutional issues, has articulated a sound position. I urge this Committee not to seek to alter that interpretation of the statute. I will return to this issue after reviewing the basic principles which underlie FISA.

The process that led to the enactment of FISA began when the Executive branch, under two Presidents from different parties, asked Congress to enact legislation authorizing electronic surveillance for national security purposes. Presidents Ford and Carter sought this legislation because of a confluence of two events. First, the Supreme Court held that wiretaps were covered by the Fourth Amendment. Second, public and Congressional concern about abuses by

intelligence agencies and the FBI made Executive branch officials reluctant to continue to conduct "national security" electronic surveillances without Congressional authorization and court supervision.

As part of the process of negotiating FISA, the Executive branch agreed to accept a provision mandating that the FISA procedures would be the sole means by which the government would conduct national security surveillances. It is dispiriting then, to say the least, to have the Justice Department now raise the issue of inherent Presidential power and to argue that since the President can act on his own and do whatever he wants, Congress can change the FISA procedures without fear of violating the Constitution. As the Supreme Court outlined in the steel seizure case, even if the President could conduct surveillances in the absence of legislation, once Congress acts, the Executive branch is bound by those rules. In any case, the government's actions must be consistent with the Constitution. The President has no inherent authority to violate the Bill of Rights.

The fundamental starting points of FISA were that the requirements of gathering information for national security purposes could not be accommodated within the procedures laid out in Title III for criminal wiretaps, and that different procedures could be authorized which would be consistent with the Constitution.

Different procedures were both necessary and appropriate because the government's purpose in seeking the information was not to gather evidence for use in criminal prosecutions. Rather, it was to gather foreign intelligence information to protect national security. But Congress recognized that some of the information gathered would comprise both national security information and evidence of criminal actions. Thus it properly provided procedures for allowing the government to use the information in criminal prosecutions of both "national security" crimes and "common" crimes.

As the FISA court reminds us in its forceful and articulate opinion, the FISA procedures differ in a number of dramatic ways from those required by Title III and provide much less protection of individual rights. The Title III requirements are, in my view, required by the Constitution when the government is conducting a criminal investigation. The government cannot circumvent these requirements simply by using another statute whose sole constitutional justification is that the government is entitled to use different procedures when it

seeks information for a different purpose. Nothing in the various government documents which defend the use of FISA for gathering evidence for prosecutorial purposes can get around this simple logic.

The government argues that 9/11 created a new situation that requires granting new powers to deal with the new threat. I agree. In balancing national security claims with those of civil liberties, the nature of the threat is certainly of great relevance. However, these newly granted authorities must be narrowly tailored to meet the new threats.

Therefore, it seems self-evident that any new authority should be limited to dealing with threats arising from international terrorist groups. FISA lends itself to this approach since procedures for dealing with international terrorism are separately included within the statute. Indeed the two new proposed amendments to FISA have the one virtue of limiting the proposed changes to international terrorism investigations.

Congress will have an opportunity to revisit the change in the purpose language when the Patriot Act's amendments to FISA expire, or sooner if the appellate courts uphold the FISA court ruling and the government seeks a legislative solution.

It is certainly true that firewalls erected between intelligence activities in the United States and in locations beyond our borders, and between our own intelligence and law enforcement bodies, are ill-suited for dealing with a clandestine group that operates both in the United States and abroad and which seeks to kill Americans everywhere in the world. This is not the place to discuss organizational changes which may be necessary to deal most effectively with this threat, but whatever the organizational structure, there should not be and are no longer legislated barriers to full cooperation and information-sharing among agencies dealing with such international terrorist groups.

The primary purpose of electronic surveillance of international terrorist groups must be, as the Attorney General has repeatedly said, to prevent new terrorist attacks. FISA surveillance of such groups would be designed for the purpose of gathering foreign intelligence information to prevent future terrorist attacks. Since all international terrorist acts are illegal, and since indictment and conviction is a standard method of preventing future attack, gathering evidence of criminal conduct will always be a legitimate byproduct of such surveillance.

Surely, officials of the Executive branch can find ways to implement cooperation between these two functions so that they are fully effective while avoiding putting officials whose goal is to gather evidence to be used in criminal prosecutions in charge of the FISA surveillance. Proceeding in this way would satisfy the requirements of the FISA court decision.

Any perceived impediments to effective cooperation and information exchange should be dealt with legislatively, by enacting "primary purpose" language and by making legislative findings related to the imperative of cooperation and information exchange between domestic and foreign activities and law enforcement and intelligence. Congress should find that there is no constitutional barrier to such cooperation in any given investigation of an international terrorist group targeting Americans around the world.

I believe that the issue that concerns Senators Schumer and Kyl can and should be addressed in the same way. The method they suggest is at odds with the whole structure of FISA. To get approval for a FISA surveillance, the government must show not only that the targeted person meets the definition but also that the information to be collected is "foreign intelligence information"—which means it must be information about "international terrorism by a foreign power or an agent of a foreign power" (underlining added), and for the acts to constitute "international terrorism" they must "transcend" international boundaries. Thus, to accomplish the intended purpose of the amendment's sponsors, all three definitions would need to be changed in ways that would fundamentally alter the statute and would risk being found to be unconstitutional.

If there is information indicating that an individual is planning terrorist acts, without any indication that he is doing so on behalf of some foreign group, constitutional ways can be found to authorize surveillance of that individual, including ascertaining whether he is in fact connected to a terrorist group. But it should not be done by simply applying the procedures of FISA wholesale to individuals, when there is no evidence that they have any connection to a foreign government or group.

Mr. Chairman, at the end of day, Congress was able to pass FISA with overwhelming support from intelligence and law enforcement agencies as well as from private civil libertarians and civil liberties organizations. This eventuality occurred not only because there were extensive hearings, but also

Statement
United States Senate Committee on the Judiciary
The USA PATRIOT Act In Practice: Shedding Light on the FISA Process.
September 10, 2002

The Honorable Patrick Leahy
United States Senator , Vermont

Today in Vermont, Arizona, North Carolina, New York, Wisconsin, Maryland and many other States, Americans are making this great democracy work by casting their votes. This committee meets today as part of its role in the democratic process, focusing oversight on one of the important, but least understood, functions of our government. In particular, we are examining how the Foreign Intelligence Surveillance Act is working – not in theory, but in practice.

We had begun our oversight hearings last summer as soon as the Senate majority shifted. After the terrorist attacks on September 11, we focused on expedited consideration of what became the USA PATRIOT Act, providing legal tools and resources to better protect our nation's security. We continue our efforts to ensure that the law is being implemented effectively and in ways that are consistent with preserving the liberties enshrined in the Constitution.

Much of our focus today will be on process issues in a secret system. In a nation of equal justice under law, process is important. In a nation whose Constitution is the bulwark of our liberty, process is essential. And in administering a system that rightfully must operate under a shroud of secrecy, process is crucial.

FISA'S ROLE

The USA PATRIOT Act made important changes to the Foreign Intelligence Surveillance Act, which is called "FISA" for short. This law set up a secret court to review government applications to conduct secret wiretaps and searches inside the United States for the purpose of collecting foreign intelligence information to help protect this nation's national security. FISA was originally enacted in the 1970s to curb widespread abuses by Presidents and former FBI officials of bugging and wiretapping Americans without any judicial warrant – based on the Executive Branch's unilateral determination that national security justified the surveillance. The targets of those wiretaps included a Member and

staff of the United States Congress, White House domestic affairs advisors, journalists and many individuals and organizations engaged in no criminal activity but, like Dr. Martin Luther King, who expressed political views threatening to those in power. Indeed, on our panel today is one of the victims of those abuses, Dr. Mort Halperin, whose telephone was illegally tapped by high-level officials in the Nixon Administration. I point that out because we need to remind ourselves that these abuses were not ancient history.

OVERSIGHT OF A SECRET SYSTEM

In the USA PATRIOT Act we sought to make FISA a more effective tool to protect our national security, but the abuses of the past are far too fresh simply to surrender to the Executive Branch unfettered discretion to determine the scope of those changes. The checks and balances of oversight and scrutiny of how these new powers are being are indispensable. Oversight of a secret system is especially difficult, but in a democracy it is also especially important.

Over the last two decades the FISA process has occurred largely in secret. Clearly, specific investigations must be kept secret, but even the basic facts about the FISA process have been resistant to sunlight. The law interpreting FISA has been developed largely behind closed doors. The Justice Department and FBI personnel who prepare the FISA applications work behind closed doors. When the FISA process hits snags, such as during the year immediately before the September 11 attacks, that adversely affects the processing of FISA surveillance applications and orders, the oversight committees of the Congress should find out a lot sooner than the summer after the September 11 attacks. Even the most general information on FISA surveillance, including how often FISA surveillance targets American citizens, or how often FISA surveillance is used in a criminal cases, is unknown to the public. In matters of national security, we must give the Executive Branch the power it needs to do its job. But we must also have public oversight of its performance. When the Founding Fathers said “if men were all angels, we would need no laws,” they did not mean secret laws.

A NEW WINDOW ON THE FISA PROCESS

Our oversight has already contributed to the public’s understanding of this

process, by bringing to light the FISA court's unanimous opinion rejecting the Justice Department's interpretation of the USA PATRIOT Act's amendments. If it had not been for the prolonged efforts of this committee, especially Senator Specter and Senator Grassley, one of the most important legal opinions in the last 20 years of national security law – even though it was unclassified – would have remained totally in secret. As it is, this unclassified opinion was issued in May, but not released until three months later, on August 20, in response to a letter that Senator Specter, Senator Grassley and I sent to the court. The May 17 opinion is the first window opened to the public and the Congress about today's FISA and about how the changes authorized by the USA PATRIOT Act are being used. Without this pressure to see the opinion, the Senators who wrote and voted on the very law in dispute would not have known how the Justice Department and the FISA court were interpreting it. The glimpses offered by this unclassified opinion raise policy, process and constitutional issues about implementation of the new law.

The first-ever appeal to the FISA Court of Review, which the Solicitor General of the United States argued yesterday, was transcribed, and yesterday, with Senator Specter and Senator Grassley, I sent a letter asking the court to provide an unclassified version of the oral argument and their decision to this committee. We need to know how this law is being interpreted and applied.

DOJ'S HANDLING OF THE USA PATRIOT ACT

Because many of the FISA provisions are subject to a sunset, it is particularly important that this committee monitor how the Justice Department is interpreting them. The Department of Justice's brief makes two sweeping claims regarding the USA PATRIOT Act amendments. First, the Department boldly claims that the longstanding definition of "foreign intelligence" adopted by numerous courts for more than 20 years is simply wrong. Specifically, it claims that the notion that domestic criminal prosecution is separate from foreign intelligence is not valid. Instead, DOJ argues that information obtained for criminal prosecution is now just one type of foreign intelligence information. Therefore, they claim that using FISA for the sole purpose of pursuing a criminal prosecution, as opposed to collecting intelligence, is allowed.

Second, the Department argues that changing the FISA test from requiring "the purpose"of collecting foreign intelligence to a "significant purpose" allows the use of FISA by prosecutors as a tool for a case even when they know from the

outset that case will be criminally prosecuted. They claim that criminal prosecutors can now initiate and direct secret FISA wiretaps -- without normal probable cause requirements and discovery protections – as another tool in criminal investigations when the strictures of Title III or the Fourth Amendment cannot be met. In short, the Department is arguing that the normal rules for Title III and criminal search warrants no longer apply in terrorism or espionage cases even for U.S. persons.

I was surprised to learn that, as the "drafter of the coordination amendment" in the USA PATRIOT Act (See Brief at 41) the Department cites my statement to support its arguments that there is no longer a distinction between using FISA for a criminal prosecution and using it to collect foreign intelligence. That was not and is not my belief. We sought to amend FISA to make it a better foreign intelligence tool. But it was not the intent of these amendments to fundamentally change FISA from a foreign intelligence tool into a criminal law enforcement tool. We all wanted to improve coordination between the criminal prosecutors and intelligence officers, but we did not intend to obliterate the distinction between the two, and we did not do so. Indeed, to make such a sweeping change in FISA would have required changes in far more parts of the statute than were affected by the USA PATRIOT Act.

In addition, as Professor Banks points out in his testimony, such changes would present serious constitutional concerns. Even before enactment of the FISA, courts relied on the non-prosecutorial purpose of foreign intelligence gathering to allow the Executive Branch leeway in conducting surveillance of foreign powers and agents in the United States. The reasoning was that, when true foreign intelligence efforts were involved, normal courts lacked the expertise, the secrecy, and the agility to protect our national security. But courts have always been careful to point out that – unlike traditional intelligence activity – when the actual purpose of wiretap is a normal criminal prosecution even for a serious terrorist crime, that our normal courts were fully competent to handle such matters. In addition, in criminal cases the Fourth Amendment's protections of privacy regain prominence. It creates serious constitutional issues for the DOJ to claim, as it does in its brief, that all these courts are incorrect and that the Department of Justice can use FISA to sidestep the Fourth Amendment's normal probable normal requirements in matters that they know from the outset are going to be normal criminal prosecutions. I am interested to hear the views of our expert panelists on the Justice Department's sweeping arguments.

MAKING FISA WORK AS IT SHOULD

The issues relating to FISA implementation are not just legal issues, however. Our Committee has also held closed sessions and briefings, and we have heard from many of the FBI and Justice Department officials responsible for processing and approving FISA applications. While I cannot detail the results of this oversight in an unclassified forum, I must say this: Before the 9-11 attacks, we discovered that the FISA process was strapped by unnecessary layers of bureaucracy and riddled with inefficiencies. Some of these inefficiencies had to do with the legal issues that we addressed in the USA PATRIOT Act, but many did not. They related to the same problems that this committee has seen time and time again at the FBI – poor communication, inadequate training, a turf mentality, and an obsession with covering up mistakes instead of addressing them head on. Even a cursory read of the unanimous FISA Court opinion bears that out. The FISC was not frustrated with the state of the law. Instead all seven federal judges were concerned about a track record marred by a series of inaccurate affidavits that even caused them to take the extraordinary step of banning an agent from appearing before the court in the future. The problems they cite were evident in the previous administration as well as the current administration. I continue to support Director Mueller's efforts to address these problems, but the going will not be easy.

As we conduct this extensive oversight I have become more convinced that there is no magic elixir to fix these problems. It is tempting to suggest further weakening of the FISA statute to respond to specific cases, but the truth is that the more difficult systemic problems must be properly addressed in order to effectively combat terrorism. Furthermore, given the secrecy of the FISA process and the law relating to the FISA, it is impossible to intelligently address the problems that do exist without risking doing more harm then good. As this week's mostly secret appeal before the FISA review court demonstrates, the consequences of amending that statute can be far reaching and perhaps unintended. FISA was enacted for a reason. FISA is even more important to the nation today than it was a year ago, before September 11, and we need it to work well. It ensures that our domestic surveillance is aimed at true national security targets and does not simply serve as an excuse to violate the constitutional rights of our own citizens. We must first exercise the utmost care and diligence in understanding and overseeing its use. Only then can we act in the nation's best interest.

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Statement
United States Senate Committee on the Judiciary
The USA PATRIOT Act In Practice: Shedding Light on the FISA Process.
September 10, 2002

The Honorable Orrin Hatch
United States Senator , Utah

Mr. Chairman, I want to commend you for holding a hearing on this important issue: the Foreign Intelligence Surveillance Act (FISA) process. The intelligence community and law enforcement agencies rely on FISA to conduct critical intelligence gathering in order to protect our country and prevent further terrorist attacks. I look forward to examining this important issue relating to the FISA process today and am hopeful we will do this in a spirit of bipartisanship. These are complex issues and this Committee's constructive role is important.

The timing of this hearing -- one day before the first year anniversary of the attack on our country - could not be more telling. Our joint session last Friday in New York City helped to emphasize to everyone the horrible tragedy that our country suffered on September 11. It reminded us of our continuing need to be vigilant in protecting our country from further terrorist attacks.

After last year's tragic attack on September 11th, the Administration and Congress worked together to enact the PATRIOT Act, a broad package of measures that provided law enforcement and the intelligence community with the necessary tools to fight terrorism worldwide and protect our country. These reforms were critical to enhance our government's ability to detect and prevent terrorist attacks from occurring again. We worked together on these reforms and passed them in the full Senate with a vote of 99 to 1.

One of the most significant issues addressed by the PATRIOT Act was the lack of effective coordination between intelligence and criminal investigations. This was not a new issue. The Bellows report relating to the Wen Ho Lee investigation, as well as a GAO Report on the subject, clearly identified the problem of intelligence sharing and the need to address the issue even before the September 11th attack. The issue was also identified by the Hart-Rudman Commission, and dated back to the 1990s.

The PATRIOT Act addressed the issue in two significant ways: First, Congress,

with Section 218 of the Act modified the "primary purpose" requirement for FISA surveillance and searches to allow FISA to be used where a significant (but not necessarily primary) purpose is to gather foreign intelligence information. Second, Section 504 of the Patriot Act specifically authorized intelligence officers who are using FISA to consult with federal law enforcement officers to "coordinate efforts to investigate or protect against" foreign threats to national security including international terrorism. Based on these two provisions, it is clear that Congress intended to allow greater use of FISA for criminal purposes; and to increase the sharing of intelligence information and coordination of investigations between intelligence and law enforcement officers.

At issue now is a very difficult but critical issue: where to draw the line between intelligence gathering and criminal investigations to ensure that our intelligence community and law enforcement agencies are fully capable of detecting and preventing future terrorist attacks while at the same time ensuring that Americans' civil liberties are preserved.

The Justice Department's interpretation of the PATRIOT Act modifications to the FISA process is currently at issue before the FISA court. I commend the Justice Department for bringing this issue to the FISA court for its review. In March of this year, the Justice Department adopted revised guidelines governing intelligence sharing and criminal prosecutions, and then sought FISA court approval for these revisions. The FISA court approved most of these modifications but rejected a portion dealing with the role of criminal prosecutors in providing advice and direction to intelligence investigations. The matter is now pending on appeal before the Foreign Intelligence Court of Review. We all expected the Courts to review this matter, but we can not deny that Congress specifically intended such enhanced information sharing to take place. We must not revert back in this process and again risk a culture that would fail to pursue aggressively the investigation of terrorist threats.

In reviewing the FISA process, we need to consider the fact that there has been a dramatic change in the terrorist landscape since 1978 when FISA was enacted. There is no question that in response to our country's efforts to fight terrorism worldwide, terrorists are increasingly operating in a more decentralized manner, far different from the terrorist threat that existed in 1978. The threat posed by a small group - even a lone terrorist - may be very real and may involve devastating consequences, even beyond those suffered by our country on

September 11. Given this increasing threat, we have to ensure that intelligence and law enforcement agencies have sufficient tools to meet this new -- and even more dangerous -- challenge.

Being now aware of the evolving terrorist threat, we also may need to examine carefully proposals to modify the FISA statute. This Committee's inquiry should be forward looking and done without exaggeration of past missteps and miscues which have since been corrected. The stakes are simply too high for anyone to inject politics into an area which requires careful and studied deliberation.

Today's witnesses will help us to consider these critical issues. I look forward to hearing from each witness. Thank you.

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United States Senate Committee on the Judiciary
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September 10, 2002

The Honorable Russ Feingold
United States Senator , Wisconsin

I want to thank Sen. Leahy for holding this very important hearing on the implementation of the Patriot Act and FISA. I want to especially compliment Senator Feinstein and Senator Specter for their very well-informed and precise analysis of the question that is before us today.

Frankly, this abuse by the Department of Justice of the language of the bill and unreasonable interpretation of the language of the bill is just the reason why I could not in the end vote for the USA PATRIOT Act. I feared that this kind of attempt would be made. This is one of several examples where I think the language, as troubling as the language was to me in many cases, is strained even beyond a reasonable interpretation in a way that does not comport with the intent of even those who supported the legislation.

One year ago today, none of us anticipated the terrible events of September 11th. Yet, since then I have watched America come together in many wonderful ways: communities uniting, people taking the time to help others and a Congress committed to protecting our country. But I believe that in our haste to develop legislation to help America that perhaps we went too far in some areas. The courts have played a significant role in exercising their role of oversight. There have been important recent court decisions prohibiting holding immigration proceedings in secret, requiring the disclosure of the identities of the hundreds of individuals rounded up since 9/11, and questioning the designation and indefinite detention of U.S. citizens as enemy combatants. Even in the most recent FISA decision we have been discussing today, it is the court and not the Department of Justice that has called out for restraint in our anti-terrorism efforts.

Last fall, as the Senate debated the Patriot Act there were very few voices, advocating a slower gait as we raced towards passing some of the most radical changes to law enforcement in a generation. And that makes this hearing all the more important.

Chairman Leahy did the right thing in holding this hearing. Congress has an important oversight responsibility and must exercise that responsibility. We must carefully examine what we have done in the battle against terrorism and

what this Department of Justice will ask us to do in the future.

Statement
United States Senate Committee on the Judiciary
The USA PATRIOT Act In Practice: Shedding Light on the FISA Process.
September 10, 2002

The Honorable Strom Thurmond
United States Senator , South Carolina

Mr. Chairman:

Thank you for holding this important hearing regarding the implementation of the USA PATRIOT Act. As we approach the anniversary of September 11, it is entirely appropriate that we examine the effectiveness of the reforms made by this historic piece of legislation. By conducting oversight, this Committee will be better able to assist the Attorney General in his efforts to keep our Nation safe from terrorism.

In the wake of last year's terrorist attacks, Congress worked in a bipartisan manner to improve our abilities to fight terrorism. The Senate, by an overwhelming margin of 98 to 1, approved the package of reforms that comprise the PATRIOT Act. The PATRIOT Act was designed to make America safer while at the same time preserving our cherished liberties. I strongly supported its passage last year, and I continue to support the reforms made by this important piece of legislation.

In the aftermath of the attacks, Congress determined that amendment of the Foreign Intelligence Surveillance Act (FISA) was necessary in order to provide for increased cooperation between intelligence officials and law enforcement. Under FISA, intelligence officials are able to secure warrants to search or conduct surveillance on individuals who are associated with foreign powers. FISA warrants enable the Government to conduct searches or surveillance if there is probable cause to believe that the target is the agent of a foreign power. This standard is more relaxed than the standard used for criminal warrants. For example, the Government does not need to show evidence of criminal activity. It is only necessary to show a target's connection with a foreign power. This standard is more lenient because the purpose of the surveillance is associated with matters of national security.

The PATRIOT Act implemented two important reforms with respect to FISA. First of all, the Act made it easier for the Government to conduct surveillance. Previously, in order to secure a FISA warrant, the government had to show that

foreign intelligence was the primary purpose of the surveillance. The PATRIOT Act amended the law by requiring that foreign intelligence be a "significant" purpose of the surveillance. The PATRIOT Act also allowed for more extensive coordination between intelligence and law enforcement officers in order to protect against acts of international terrorism.

In response to the changes in the law, the Department of Justice issued new rules governing FISA warrant applications and the sharing of information between intelligence and law enforcement officers. On May 17, 2002, the Foreign Intelligence Surveillance Court rejected portions of these new procedures as they applied to U.S. citizens and resident aliens. The case is now on appeal to the FISA Court of Review.

I have reviewed the Attorney General's interpretation of current law and the actions taken by the Department of Justice, and I find the Department's positions to be consistent with the reforms made by the PATRIOT Act. The Department has properly construed the changes that Congress made to FISA. For example, the Department has correctly noted that it is now appropriate to secure a FISA warrant if an important purpose of the surveillance is related to a criminal investigation, as long as foreign intelligence remains a significant purpose of the overall investigation. The Department has also appropriately implemented the provisions of the PATRIOT Act that allow for the coordination of intelligence and law enforcement investigations. When this Committee considered the PATRIOT Act, we meant to enhance information sharing. We concluded that it is dangerous to the safety of our Nation to erect artificial walls between intelligence officers and law enforcement officers. The PATRIOT Act provided for the proper coordination and sharing of information, so that our Government does not fight the war on terrorism with one hand tied behind its back.

Unfortunately, the Foreign Intelligence Surveillance Court held that these new procedures result in an end-run around the strict requirements of a criminal search warrant. By allowing criminal prosecutors to advise intelligence officials on the initiation, operation, or continuation of FISA searches, the Court found a blurring of the line between law enforcement purposes and intelligence purposes.

However, this analysis fails to account for the protections that are still provided for in the FISA regime. First of all, in order to obtain a FISA warrant, the Government must show that there is probable cause to believe that the target is the agent of a foreign power. Law enforcement officers cannot avoid the stricter requirements of criminal warrants unless they can show a suspect's connection

to a foreign power. Second, foreign intelligence must be a significant purpose of the investigation. Therefore, unless foreign intelligence makes up a critical component of the overall investigation, the more lenient standards of FISA are not available to the Government.

With these protections available, there is no need to curtail the changes made by Congress in the PATRIOT Act. Congress did not create a massive loophole in FISA through which all criminal investigations could go. Rather, Congress made reasonable changes that provide the Department with the tools necessary to fight terrorists who reside in our country and who are associated with foreign powers.

Mr. Chairman, I am pleased that we are discussing these important issues relating to FISA and the changes made by the PATRIOT Act. At the end of the day, the courts will decide many of these issues. However, I think it is important for members of this Committee to make known their views about the intent and purpose of the PATRIOT Act. The Department of Justice has done a commendable job in adjusting FISA procedures according to the changes that Congress made to the law. I would like to welcome our witnesses here today, and I look forward to hearing their testimony.

Statement
United States Senate Committee on the Judiciary
The USA PATRIOT Act In Practice: Shedding Light on the FISA Process.
September 10, 2002

The Honorable Charles Grassley
United States Senator , Iowa

Thank you Mr. Chairman for holding this important hearing today regarding the work being done by the Foreign Intelligence Surveillance Court and those entities responsible for bringing their investigations before it. The Foreign Intelligence Surveillance Act provides a statutory framework for electronic surveillance in the context of foreign intelligence gathering. Investigations for this purpose give rise to a tension between the Government's legitimate national security interests and the protection of an individual's privacy rights. Congress, through legislation, has sought to strike a delicate balance between national security and personal privacy interests in this sensitive arena.

However, in the past, there have been problems in the FISA process; a misunderstanding of the rules governing the application procedure, varying interpretations of the law, and a lack of communication amongst all those involved in the FISA application process. The Zacarias Moussaoui investigation is a recent example of this.

Compounding the problem is the attitude of "careerist" senior FBI agents who rapidly move through sensitive positions. This "ticket punching" is routinely allowed to take place at the expense of maintaining critical institutional knowledge in key positions. This has exacerbated the process and I believe severely hampered the ability of the Government to apply FISA properly.

All these problems demonstrate that there is a dire need here for a thorough review of procedural and substantive practices. I believe that this Committee needs to be even more vigilant in its oversight responsibilities regarding the entire FISA process and the FISA Court itself.

Government transparency is a constitutional presumption in a self-governing nation worried about government abuses. I'm not saying the FISA process is fatally flawed, but rather its administration and coordination needs review and

improvement.

What made the headlines recently was the refusal of the FISA court to grant the Justice Department new surveillance and investigative authority.

In its opinion, the court emphasized that the FBI had previously submitted 75 inaccurate applications that sometimes contained downright false information to the Court for search warrants and wiretaps.

Let me clarify that these abuses of the FISA Court's trust by the FBI did not take place under Mr. Ashcroft's watch. Rather, the misuse of its powers occurred while Janet Reno was attorney general and Louis Freeh headed the FBI.

The misleading representations made by the FBI included: an erroneous statement by the FBI director that a FISA target was not a criminal suspect; erroneous statements in FISA affidavits by some FBI agents concerning a purported "wall" between intelligence and criminal investigations, and the unauthorized sharing of FISA information with FBI criminal investigators and assistant United States attorneys; and, omissions of material facts from FBI FISA affidavits concealing that a FISA target had been the subject of a prior criminal investigation.

The government similarly reported several instances of noncompliance with a promised "wall of separation" between foreign intelligence gathering and criminal prosecution. Mr. Ashcroft subsequently began an investigation as to who was responsible for this noncompliance. That was the right thing to do and I commend him for looking into this matter.

But now, the Justice Department is appealing the FISA court's denial of the new authority it asked for in March because it needs these new powers in the war against terrorism.

The Department argues that under changes authorized by the USA Patriot Act, it could undertake searches and wiretaps "primarily for a law enforcement purpose, so long as a significant foreign-intelligence purpose remains."

What's at stake in the conflict between the Justice Department and the FISA court is whether this country can secure its liberties against terrorism without compromising them. I think we can. Established by Congress in 1978, the court allows the FBI to conduct electronic surveillance and physical searches in gathering foreign intelligence on terrorism and espionage.

But, unlike regular court warrants for criminal investigations, FISA doesn't require the FBI to show that a crime is “being” committed to obtain a FISA warrant.

Due process means the justice system has to be fair and accountable when the system breaks down, as it did in the failure of the FBI to adhere to the rule of law, and the failure of the FISA court to hold the FBI accountable for so long. What I find troubling is the failure of Congress to exercise its oversight power over the FBI and the Justice Department while all this noncompliance was going on under the watch of Janet Reno and Louis Freeh.

As an illustration of the result of the breakdown in the FISA process, FBI Special Agent Coleen Rowley wrote in a letter to FBI Director Mueller, "There was a great deal of frustration expressed on the part of the Minneapolis office toward what they viewed as a less than aggressive attitude from headquarters." "The bottom line is that headquarters was the problem."

I was glad to hear Director Mueller say earlier this year; "There is no room after the attacks for the types of problems and attitudes that could inhibit our efforts."

Many things are different now since the tragic events of last September, but one thing that hasn't changed is the United States Constitution. We here in Congress must work to guarantee the civil liberties of our people, while at the same time, meet our obligations to America’s national security. There needs to be a proper balance.